

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

LISA A. KENNICOTT, et al.,

Plaintiffs,

VS.

NO. CV 17-0188 JB

SANDIA CORPORATION d/b/a SANDIA NATIONAL
LABORATORIES,

Defendant.

Transcript of Telephonic Hearing Proceedings
before The Honorable James O. Browning, United States
District Judge, Albuquerque, Bernalillo County,
New Mexico, commencing on June 12, 2017.

Via phone for the Plaintiffs: Ms. Kelly Dermody; Mr.
David Lopez; Ms. Lin Yee Chan

Via phone for the Defendant: Mr. Scott Gordon; Mr.
Jeffrey Lowry; Ms. Grace Speights; Ms. Cindy Lovato
Farmer

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1 THE COURT: Okay. First of all, good
2 afternoon to everyone. I appreciate everyone letting
3 me appear by telephone from the Dallas area. My
4 middle son came out after he finished his teaching on
5 the east coast, and he's been spending a couple of
6 weeks with us in the Albuquerque and Dallas area, and
7 he's going to fly out of Dallas on Wednesday. So if
8 Ms. Wild lets me, I may hang around here to
9 Wednesday. I may have to come back tomorrow for a
10 Daubert hearing on Wednesday. So we'll see how it
11 goes. But again, I appreciate everybody's courtesy
12 in letting me do this hearing and scheduling
13 conference by phone.

14 All right. The court will call Lisa A.
15 Kennicott, et al., versus Sandia Corporation, case
16 number 17-CV-0188 JB.

17 If counsel will enter their appearances for
18 the plaintiffs.

19 MS. DERMODY: Yes, Your Honor. Good
20 afternoon. This is Kelly Dermody for the plaintiffs.

21 THE COURT: Ms. Dermody, good afternoon to
22 you. Who else is for the plaintiffs?

23 MR. LOPEZ: David Lopez.

24 THE COURT: All right. Mr. Lopez, good
25 afternoon to you.

1 Ms. Chan, were you on the phone as well?

2 MS. CHAN: Yes, Your Honor, this is Lin
3 Chan from Lief Cabraser for the plaintiffs.

4 THE COURT: All right. Ms. Chan, good
5 afternoon to you.

6 All right. And for the defendants? Mr.
7 Gordon, are you the phone?

8 MR. GORDON: Yes, sir. Good afternoon,
9 Judge. Scott Gordon and Jeff Lowry of the Rodey Law
10 Firm for Defendant Sandia.

11 THE COURT: All right. Mr. Gordon, Mr.
12 Lowry, good afternoon to you.

13 And from Morgan Lewis?

14 MS. SPEIGHTS: Good afternoon, Your Honor.
15 This is Grace Speights at Morgan Lewis.

16 THE COURT: Ms. Speights, good afternoon to
17 you.

18 And Ms. Farmer, were you on the phone?

19 MS. LOVATO FARMER: Yes, Your Honor, Cindy
20 Lovato Farmer with Sandia National Laboratories.
21 Good afternoon.

22 THE COURT: Ms. Farmer, good afternoon to
23 you.

24 Anyone else that's making an appearance
25 this afternoon?

1 All right. I have reviewed the joint
2 status report -- and there was one disclosure I want
3 to make. I don't think it should disqualify me, but
4 I do want to make a disclosure because it's hard for
5 me to tell from the list of witnesses. I think
6 Sandia listed an individual named Sean Kerr, K-E-R-R.
7 I think I know Sean. I don't know for certain he
8 works at Sandia Labs. But it probably is the same
9 person, and I may have been told in the past that he
10 works for Sandia. Sean, for many years, went to
11 church with me at Montgomery Church of Christ over on
12 Montgomery. He does not go there anymore to the best
13 of my knowledge. He hasn't gone in probably five or
14 six years. I'm sort of guessing at this. I'm going
15 to put a burden here on Mr. Gordon in a moment to
16 maybe call Mr. Kerr and get some information, and
17 make sure it's the same person, and then communicate
18 that information to the plaintiffs. I see Sean
19 around. I see his family around. I think he has an
20 older son that may be at college by now. I think --
21 a few years ago I went on the board a few years ago
22 of Lubbock Christian University. I have a vague
23 recollection that he and his family had some
24 connection there, and may have come to my house for a
25 reception a few years ago. I am no longer on the

1 board of that school. So other than just seeing him
2 around, maybe seeing him at area-wide church events
3 with other churches and things, or seeing him in
4 shopping locations -- I don't think I've ever been in
5 his home; he might have been in mine. And we'll let
6 Mr. Gordon determine that. I don't think that I have
7 an association with him that would keep me from being
8 fair and impartial to the parties here. But if
9 anybody has any questions, don't hesitate to ask, or
10 any concerns, don't hesitate to ask. But I'll wait
11 and let Mr. Gordon contact Mr. Kerr, and see if I've
12 got the right individual, and provide any further
13 information from Mr. Kerr to the plaintiffs. And if
14 anybody has any concern, don't hesitate to have them
15 call my courtroom deputy. I'll instruct my courtroom
16 deputy not to tell me who called. And we'll get back
17 on the phone and have a telephone conference if
18 anybody has any concerns or questions.

19 Let me put aside the joint status report,
20 and let's deal first with the two motions that we
21 have here: The motion to dismiss the state law
22 claims, and then the plaintiffs' motion for -- to
23 conduct some jurisdictional discovery.

24 Here is what I propose on this: It sure
25 seems to me -- interestingly enough, I spent the

1 weekend working on the Benavidez case. If anybody
2 has been following that with some care, you can see
3 that I have a motion to reconsider in that case. So
4 it's very much on my mind this weekend. In fact, I
5 emailed a large number of pages to my law clerk
6 throughout the morning as I worked on that opinion.
7 So what I did in Benavidez is very much on my mind.

8 In reading everything, it seems to me that,
9 very likely, these state law claims are going to be
10 barred. I don't make any determination on that, but
11 it seems to me they're going to be barred. And I
12 would be inclined to grant this motion to dismiss.

13 As far as discovery, we're about to go into
14 discovery. I am trying to figure out a little bit
15 what the parties are proposing. It looks like y'all
16 wanted some bifurcated discovery. It would seem to
17 me that we ought to allow, probably, some discovery
18 on jurisdictional issues as we get started with
19 discovery.

20 It seems to me that probably we're focusing
21 at the present time on Kennicott, Garcia, and Phelps.
22 It would seem to me that, probably, they know as much
23 about their employment situation as maybe even Sandia
24 does. And chances are, if anything had really
25 bubbled up, there would be an affidavit from them.

1 But chances are they're a mainstream employee out at
2 the main facility out on Kirtland Air Force Base, and
3 they probably are not going to have any state claims,
4 and probably shouldn't be representing anybody that
5 has state claims if they don't have state claims.

6 So for the present time, I'd be inclined to
7 strip these out. If the plaintiffs stumble into some
8 discovery or things that need to bring these claims
9 back in, they can move the Court to bring them back
10 in.

11 I am getting ready for a fairly large
12 hearing up in Tulsa, Oklahoma. All the judges have
13 recused themselves on a large, rather complex
14 commercial case up there, and I'm going to have to
15 head up to Tulsa pretty quick. I will probably not
16 get to turn back to putting the opinion and order
17 together on these two motions until I get back in
18 early July. So that gives a little bit of time to
19 get some discovery going. If something pops up, then
20 we can think about adding these claims back in. I
21 think we're at such an early point. But I think,
22 realistically, these claims are not likely to be
23 hanging around this case.

24 So those are my thoughts on these two
25 motions, because they're interrelated.

1 But, Mr. Gordon, Ms. Speights, one of you
2 going to argue this motion to dismiss?

3 MR. GORDON: That would be me, Judge.

4 THE COURT: Mr. Gordon.

5 MR. GORDON: Yes, sir. This is Scott
6 Gordon.

7 And that plan makes sense to us. I won't
8 belabor the point by arguing what's already in our
9 briefs. We don't really have any intention of trying
10 to stop the plaintiffs from taking discovery on where
11 these human resources decisions were made, where the
12 policies originated. They can ask those questions.
13 I think we know what they'll find.

14 But, down the road, if they think they have
15 enough information to make a good faith allegation
16 that something happened outside the fence of the
17 federal enclave, why, then they can show it to us,
18 and we'll talk to them about whether we oppose a
19 motion to amend or not.

20 But at this point, it makes more sense to
21 us to dismiss the state law claims; let them ask
22 whatever questions they want about jurisdictional
23 issues in the meantime, and then just see where it
24 takes us.

25 So, unless the Court has any specific

1 questions about any of the arguments that I made,
2 I'll just leave it at that.

3 THE COURT: All right. Thank you,
4 Mr. Gordon.

5 Ms. Dermody, are you going to take the lead
6 on this?

7 MS. DERMODY: Yes, Your Honor. Thank you.

8 THE COURT: Ms. Dermody.

9 MS. DERMODY: Yes, this is Kelly Dermody.

10 The plan that you have laid out makes a lot
11 of sense. You know, we want to discover these facts.
12 And whatever process we get to discover them, we can
13 then present them to the Court. I think that that's
14 a fair proposal.

15 The only concern that we might have, Your
16 Honor, is that if you were to dismiss the state
17 claims, and then, downstream reinstate them, there
18 might be some question as to when the state class
19 period starts. And we -- if the state class period
20 would only start at the time that the claims were
21 added to the amended complaint, obviously, we would
22 be very concerned about the prejudice to the class.

23 So, if the Court is inclined to do that,
24 then we want to have our argument now, and preserve
25 those state claims, so we don't come down to that

1 issue downstream.

2 THE COURT: Well, here's what I propose
3 is -- I'm not purposely sitting on this order, but
4 I'm not going to enter an order immediately. I'm
5 going to tell you I'm inclined to dismiss these
6 claims. I've just got to turn to this Tulsa case in
7 a robust way.

8 And so, you know, you get your discovery
9 started. If you see anything, send it in to me. I
10 mean, I think the jurisdictional issue turns this,
11 basically, into 12(b)(1), so I can consider materials
12 outside of the complaint.

13 So if I see something that gives me pause,
14 I'll pause. If I don't see anything that gives me
15 pause, I'll certainly look at the material,
16 acknowledge it. And then at some point -- but it's
17 not going to be this month, it's probably going to be
18 next month at the earliest -- I'm going to start
19 putting together some opinion and order on this.

20 Does that give you some guidance?

21 MS. DERMODY: It does, Your Honor. Thank
22 you very much.

23 The only other thing I might add to our
24 position on this is, for purposes of discovery, just
25 so we aren't misunderstood by opposing counsel, I

1 think our view, and it might be different from
2 theirs, is that under the Camargo case, the location
3 of the work site is not dispositive of this question.
4 And because we are challenging company-wide policy
5 for the purpose of a class challenge, we obviously
6 are going to be focused, for jurisdictional purposes,
7 on where those policies were developed, implemented,
8 monitored, et cetera, as opposed to the ultimate
9 impact of those policies someplace out in the
10 workforce.

11 Just to make sure we're putting all our
12 cards on the table, that would be the direction of
13 our jurisdictional discovery. And we hope that
14 that's consistent with Your Honor's guidance.

15 THE COURT: Well, I'll tell Mr. Gordon
16 this, without ruling definitively, we know that
17 this -- you know, it's probably going to be something
18 that it's easier and better for me to make it a
19 concrete situation. But I tend to be fairly liberal
20 on this. And I'll signal to Mr. Gordon that if he
21 wants to cut you back and limit your discovery, I'm
22 not telling him that he can't. I'll tell you how I'm
23 going to handle discovery in these matters in a
24 moment when we get ready for the initial scheduling
25 conference on this. But I'm not going to tell

1 Mr. Gordon that he can't object. But I am going to
2 signal to him that I'm pretty liberal on this issue,
3 and encourage him to sort of think of and be liberal
4 in the discovery as well. I would be inclined to be
5 fairly liberal on what I'll call jurisdictional
6 discovery, without precluding anybody's position at
7 this point. Just signal that I'm probably going to
8 allow fairly liberal discovery in this area.

9 MR. GORDON: I understand, Judge.

10 MS. DERMODY: Thank you, Your Honor.

11 THE COURT: Anything else on that, Ms.
12 Dermody?

13 MS. DERMODY: No, Your Honor. This is very
14 helpful, and we appreciate the guidance on this.

15 THE COURT: How about you, Mr. Gordon? Do
16 you have anything else you wanted to say on this
17 issue?

18 MR. GORDON: No, sir. The plan makes
19 sense.

20 THE COURT: All right. So I will at some
21 point get an opinion and order together on these two
22 motions. I think we know where we're going. And if
23 there is any issues, we'll talk about how to resolve
24 those, how I go about making myself available here in
25 a moment.

1 I have reviewed, as I've indicated, the two
2 motions. I also have reviewed your joint status
3 report and provisional discovery plan. And because
4 this case has been a bit in the news out here, I know
5 a little bit more about this case than I do about
6 other cases. But is there anything else you'd like
7 to tell the Court about the case that might impact
8 scheduling or how we're going to handle matters, Ms.
9 Dermody?

10 MS. DERMODY: Sure, Your Honor.

11 So I don't at all -- presume Your Honor is
12 very familiar with these types of cases, so I don't
13 want to sound like I'm giving Your Honor feedback you
14 don't already have.

15 I will say, just speaking personally about
16 what's been happening in similar cases over the last
17 couple of years, that we have had -- both sides -- a
18 long period of time to get right the data collection
19 in these cases, which seems to be the essential piece
20 of evidence. So often, notwithstanding the best
21 efforts of both sides, getting data that is clean,
22 reliable, and the right fields, getting our experts
23 able to look at that data, to tell Your Honor what
24 they're seeing takes longer than anyone would like to
25 have happen. It seems the other things in the case

1 often go a lot faster. But that gets bogged down.
2 So all I will say is we tried to propose a schedule
3 which was extremely ambitious, relative to what's
4 been happening in other cases.

5 And we might end up coming back to Your
6 Honor if we're having trouble. But I don't expect,
7 with the quality on the other side of this case, that
8 it won't be for any lack of diligence or anything
9 else like that. It just -- it does take a long time.
10 And these cases are -- quite often have quite a few
11 moving parts and some complexities that we don't
12 always know walking into them.

13 THE COURT: All right. Well, I do attend
14 usually annually at NYU, Sam Estreicher -- he's a
15 former pal clerk of mine, and also use it as an
16 excuse to go see my boys in New York. So I do sit
17 through the NYU's employment law. So that gives me a
18 good perspective nationwide, as well as here in New
19 Mexico, of some of the complexities with these
20 employment cases.

21 Mr. Gordon, do you have anything else you'd
22 like to tell the Court about the case that might
23 impact scheduling or how we're going to handle
24 matters in this case?

25 MR. GORDON: Your Honor, I defer to my

1 colleague, Grace Speights. She agreed to speak to
2 those questions.

3 THE COURT: All right. Ms. Speights.

4 MS. SPEIGHTS: Thank you, Your Honor.

5 I do agree with Ms. Dermody. We both have
6 handled many of these cases. And even though there
7 are good intentions, sometimes they take a little
8 longer than expected. And a lot does depend on the
9 production and analysis of the data.

10 Having said that, the parties have worked
11 hard, I believe, to come up with a practical schedule
12 that hopefully will take that into account. But,
13 obviously, if we find that we are having difficulty
14 meeting that, we'll confer with the other side and
15 try to work out some agreement to bring to Your Honor
16 for approval.

17 THE COURT: All right. Thank you, Ms.
18 Speights.

19 All right. Let me give you some dates. It
20 always makes me, as a trial judge, a little nervous
21 to set some dates without putting a trial date on it.
22 I learned long ago that that usually is the best
23 thing a trial judge can do. But I respect the
24 counsel in this case, so most of the things that
25 you're proposing here are yours, and I'll go along

1 with that.

2 So discovery will end 30 days before the
3 summary judgment. And I'm not sure that we came up
4 with a date for the summary judgment, but we do have
5 some other dates. So let me keep moving and come
6 back to that in a moment.

7 What I would propose is, I'd like to have a
8 date for some discovery motions, at least on this
9 class certification stage. So you're looking at your
10 motion for class certification being in 2018. I'll
11 toss this out; if we need to revise it, I'll come
12 back to it. I'll set a deadline for all discovery
13 motions for -- let me pull my calendar -- what if we
14 set it for April 30th of 2018. Try to front-load
15 these discovery disputes. You can file motions in
16 advance, but at least have a deadline on this class
17 certification for April 30.

18 The plaintiff will identify -- let's see,
19 let me just skip experts here for a moment.

20 And then all pretrial motions will be due
21 90 days after the ruling on the class certification.

22 Let me look at what you said here on
23 joining parties.

24 MS. DERMODY: Your Honor, this is Kelly
25 Dermody.

1 Would it help if I attempted to give an
2 overview of what our concept was here?

3 THE COURT: Well, I think I understand.
4 Let me just -- hold on a second. Let me -- while I'm
5 getting some of these dates out, let me get those
6 out, and then I'll come right back to that.

7 The plaintiff shall be allowed until 90
8 days before the filing of their motion for class
9 certification, or February 19, 2018, to move to amend
10 the pleadings and/or to join additional parties in
11 compliance with the requirements of Rule 15(a). And
12 when I say identify your expert, that means identify
13 your expert, produce your expert report, and have
14 your experts ready to be deposed. They don't have to
15 deposed that day, but have them ready to go, because
16 the defendant is going to need to do the same for its
17 expert or experts by March 5, 2018.

18 I will set a motion -- the motion for class
19 certification will be due by May 18, 2018. And
20 response to the class certification motion will be
21 due August 1, 2018. The reply to the class
22 certification motion will be due September 21, 2018.
23 And then the motion hearing on the class
24 certification will be September 26, 2018, at 9:00
25 a.m.

1 One question I had is how long do you think
2 that this class certification hearing will last? Are
3 y'all thinking of a day, or are you thinking of
4 something longer? Ms. Dermody?

5 MS. DERMODY: Sure, Your Honor. I have
6 seen it run the gamut, an hour to six hours to two
7 days. I think it purely is what Your Honor wants to
8 hear. I'd say it's much more common that we're in
9 court for a half day arguing our positions. But,
10 again, we will do whatever is helpful to the Court.

11 THE COURT: Mr. Gordon, Ms. Speights, do
12 you have some thoughts on how long you think the
13 class certification hearing will last?

14 MS. SPEIGHTS: I think it's more likely a
15 half day, Your Honor.

16 THE COURT: Okay. All right. So why don't
17 I leave it for a day. We'll just plan for a day, and
18 that should give you enough time. I won't schedule
19 it for two days. As y'all get closer, and you think
20 it's going to take more time than the day I'm
21 allotting for it, call my courtroom deputy as soon as
22 you sort of think about that, that it may be more
23 than one day. And then we may -- we can see if we
24 still got a day there.

25 I will order that supplementation under

1 Rule 26(e) regarding damages issues will be due 30
2 days before trial, and supplementation under Rule
3 26(e) regarding nondamage issues will be due 30 days
4 before the summary judgment.

5 Y'all didn't indicate at that point whether
6 it was 30 days before summary judgment was decided,
7 or the motions were filed. So I'm going to need a
8 little bit of guidance on that. I know there are
9 some exceptions that we need to deal with.

10 But why don't I pause here, because I
11 believe those are all the deadlines that I was able
12 to extract from the joint scheduling order. And if I
13 need to set other deadlines, I'll work with you to do
14 that.

15 So, Ms. Dermody, what else do you need or
16 what did I maybe overlook as deadlines that you want
17 set?

18 MS. DERMODY: Yes, thank you very much,
19 Your Honor.

20 I think there might be a little bit of
21 confusion on how we communicated this to Your Honor.
22 And for that, I apologize.

23 On page 11 of our joint filing, the parties
24 jointly proposed that the expert reports be filed
25 with the motions for class certification.

1 And the reason that this might be important
2 for purposes of scheduling is that the discovery
3 deadline that Your Honor indicated, which was a lot
4 earlier than that, cuts very far into that problem
5 that I mentioned earlier about getting the expert
6 data and the reports ready. I'm not confident at all
7 that we collectively would be in a position to
8 discover experts in February.

9 I am confident that if we have a regular
10 production and good faith on both sides, we can get
11 this done for the May deadline. But I worry very
12 much that this is not workable. So that's one topic.

13 And the other is just confirming with Your
14 Honor that the discovery motion deadline of April 30
15 contemplates the preclass certification discovery.
16 It doesn't mean all discovery motions for the case.
17 Because I imagine there might be some additional
18 cleanup after classification where we could, in fact,
19 have a motion. Not that I contemplate one right now,
20 but it could come up, and I wouldn't want us to agree
21 that we couldn't ever bring it at that point.

22 THE COURT: No, I was treating -- for
23 better or worse, I was treating the class
24 certification stage as almost its own trial, and,
25 therefore, giving you an earlier discovery deadline.

1 Then I would guess we would need to set another one
2 after the class certification to have another
3 deadline for discovery related to the merits
4 discovery.

5 MS. DERMODY: Yes, Your Honor, that makes
6 sense.

7 On page 12 of our statement, one
8 alternative that the parties proposed, and maybe it's
9 not a good fit for Your Honor's practice, but we
10 thought that, given that it's a class certification
11 motion that's coming, and it will so greatly change
12 the shape of the trial, that we don't candidly know
13 collectively how much time it will take between the
14 class certification decision and getting into the
15 courtroom for trial.

16 If the Court denies class cert, that's a
17 very small case that is going to be ready right away.
18 If the Court grants cert or grants some part of cert,
19 it may take a little bit of time to do the revised
20 damages analysis, because we'll have updated data at
21 that point for trial. And some trial witness
22 depositions that we probably wouldn't want to
23 front-load now, not knowing that we'll ever have to
24 take those depositions.

25 But if we were able to come back to the

1 Court after the cert decision, we could then have a
2 much more specific, planned trial, and we might not
3 have quite as much ambiguity and cloud over some of
4 these deadlines.

5 THE COURT: No. If Sandia agrees with you
6 on that, I'll go along with it. It's not my favorite
7 way to run a case, but I'll go along with y'all on
8 this case. Are y'all in agreement on that,
9 Ms. Speights?

10 MS. SPEIGHTS: We are, Your Honor.

11 THE COURT: All right. So that's fine.
12 I'll go along with it.

13 So what else do you need as far as
14 deadlines? Am I articulating all the deadlines that
15 y'all have agreed to, or need? Or am I overlooking
16 something, Ms. Dermody?

17 MS. DERMODY: Yes, Your Honor, I think
18 you've done a great job, given how perhaps confusing
19 we made this for Your Honor.

20 The only last thing, I would just go back
21 to the question on page 11, where we had jointly
22 proposed the time for filing the expert reports, just
23 to see if the Court would adopt the parties' joint
24 proposal, as opposed to doing the schedule that I
25 think the Court first outlined when you were

1 understanding our proposal differently.

2 THE CLERK: Judge, this is Ms. Wild. Can I
3 ask you a question?

4 THE COURT: Hold on just a second. Let me
5 ask Ms. Dermody. You keep saying page 11. Are you
6 referring to the section that, to me, looks like page
7 13, where it says "pretrial motions schedule," where
8 it says, "plaintiffs' motion for class certification
9 and plaintiffs' expert report"?

10 MS. DERMODY: No, Your Honor. I'm
11 referring to page 11 of Document 39. The subheading
12 is "scheduling," and it says "Reports from retained
13 experts under Rule 26(a)(2) due," and then says from
14 plaintiffs, when we file for class cert, and from
15 defendant, when it files its opposition.

16 THE CLERK: Judge, I think the confusion is
17 when you were giving out the deadlines for amending
18 the pleadings and joining the parties, you gave out
19 the February 19th or the 90 days before the class --
20 filing of the class cert motion for the plaintiffs.
21 And then you shifted gears and you said -- then you
22 went into the expert -- I think you said March 5th
23 for the defendants to identify experts. And I'm just
24 wondering if that may be where some of the confusion
25 is coming in.

1 THE COURT: Well, I could just be very
2 wrong, but I didn't think -- I think I just skipped
3 over the experts entirely because I didn't quite
4 understand what the parties were wanting. I'm
5 looking at page 11, I'm looking at page 13. Is there
6 a difference between the plaintiffs' motion for class
7 certification and plaintiffs' expert reports will be
8 due on May 18, 2018? Is that different from what
9 you're suggesting on page 11?

10 MS. DERMODY: No, Your Honor. They are the
11 same.

12 I think Ms. Speights was -- thank you, Ms.
13 Speights, for trying to clean up for me. I was
14 confused by Your Honor's comments about expert
15 disclosures and making experts available for
16 deposition. I just wanted to make sure we were on
17 the same page in terms of the overall schedule of
18 when we file expert reports, which presumably, then,
19 expert depositions would follow that filing deadline.

20 MS. SPEIGHTS: Your Honor, this is Grace
21 Speights, if I may.

22 What we are proposing here is the
23 plaintiffs would file their motion for class
24 certification. With that would be their expert
25 reports. That would be the first time that we would

1 see those. And then between May 18, when they file
2 that with the expert reports, and August 1, 2018,
3 when our opposition would be due, in addition to
4 writing our opposition to class cert, we would depose
5 their experts at that time; so between May 18 and
6 August 1. And then it would be the same thing for
7 them. After we file our opposition, with our
8 opposition, we would file our expert reports, and
9 between August 1, which is when we file, and
10 September 21, 2018, which is when their reply is due,
11 they would depose our experts, and then include
12 whatever supplemental expert reports they would have
13 in their reply.

14 Am I right, Ms. Dermody?

15 MS. DERMODY: Yes, that's right. Thank
16 you.

17 THE COURT: All right. We'll write that in
18 to the scheduling order that my CRD will put
19 together.

20 Any other deadlines that you need the Court
21 to set, or anything else I've overlooked, Ms.
22 Dermody?

23 MS. DERMODY: No, Your Honor. Thank you
24 very much. And this is a practice pointer for our
25 team to be a little better about setting these things

1 out so the Court doesn't have to guess. We
2 apologize.

3 THE COURT: How about you, Ms. Speights?
4 Any other deadlines that you need set, or anything
5 else I've overlooked?

6 MS. SPEIGHTS: No, I think those are the
7 only deadlines for now, Your Honor.

8 THE COURT: Okay. A few other things
9 that -- I'm looking at my notes -- that I need to
10 state, I guess supplementation under Rule 26(e)
11 regarding damages issues will be due 30 days before
12 trial. Supplementation under Rule 26(e) regarding
13 nondamage issues will be due 30 days before the
14 summary adjustment. And again, this is where I'm
15 confused. Did y'all want this before the summary
16 judgment is decided? Before it's filed? What did
17 y'all -- what was that supplementation pegged to, Ms.
18 Dermody?

19 MS. DERMODY: I think, Your Honor, we
20 were -- again, not in a particularly coherent way --
21 trying to give the Court some comfort that we had a
22 plan that wouldn't just drag this case out forever.
23 But candidly, our preference would be to not set any
24 of these post-certification dates, and to come back
25 to Your Honor when we get the order. Because, again,

1 I think some of this is guesswork right now.

2 But the general framework would be to have
3 these ideas about how to schedule the case so that it
4 makes sense for the Court that the case is going to
5 close 30 days before trial, and there is not going to
6 be some -- any guessing about that. That's the
7 parties' concept right now. And we would adhere to
8 it later on.

9 THE COURT: Are you comfortable with that
10 as well, Ms. Speights?

11 MS. SPEIGHTS: Yes, Your Honor.

12 THE COURT: Okay. All right. So we won't
13 set those deadlines then.

14 Let me ask. Let me go back to the
15 discovery ends. Is what y'all were trying to
16 communicate with, again, the phrase "30 days before
17 summary judgment," is that a deadline that you don't
18 want set because that was one for all discovery? Or
19 is that just on the discovery for class
20 certification, Ms. Dermody?

21 MS. DERMODY: I don't think the parties had
22 contemplated a date certain for discovery cutoff
23 before class certification. I think this was -- this
24 Footnote 2 on page 12 was about what we would
25 anticipate proposing to the Court at the time we come

1 back to the Court after class certification, before
2 the close of discovery pretrial.

3 So I don't know that we have any thoughts
4 in mind about that cutoff before then.

5 THE COURT: So you're not having any
6 discovery cutoff on class certification, but you want
7 me to set these dates, for example, when the motion
8 is due. That's more important to you than discovery
9 cutoff on class certification.

10 MS. DERMODY: Yes, Your Honor. I think the
11 parties jointly contemplate that once the motion is
12 filed, there is not going to be additional discovery
13 happening. We're not -- neither side is in the game
14 of sandbagging each other, and there is a lot to do
15 during that briefing. So I think we collectively
16 agree it's a good idea to put the pause button on.
17 But it could be, for reasons that I don't know yet,
18 that we'll still be collecting information in the
19 days leading up to the class motion. I just don't
20 know.

21 THE COURT: Okay. Are you comfortable with
22 that, Ms. Speights?

23 MS. SPEIGHTS: Yes, Your Honor. We
24 normally just go right up to the motion for class
25 certification being filed.

1 THE COURT: Okay. And then we're not
2 setting any cutoff, because we're going to turn
3 around and probably go into merits discovery shortly
4 thereafter, and we'll set some cutoff after the
5 ruling on the class certification. Is that your
6 thoughts?

7 MS. SPEIGHTS: Well, Your Honor -- this is
8 Grace Speights. In terms of merits discovery, I
9 mean, in terms of anything related to class
10 certification and class merits, I mean, we believed
11 that all of that was going to be done before class
12 certification, at least that's our position. I think
13 that's one of the issues that may be in the
14 exceptions when we talk about post-certification
15 discovery.

16 THE COURT: Okay. Let's move to those.
17 I'm looking at page 17. Tell me what the dispute is.

18 I'll let you start, Ms. Dermody. Do you
19 want to tell me what the exception is as to timing of
20 discovery?

21 MS. DERMODY: Sure, Your Honor.

22 I think this might be an issue where
23 sometimes labels get in the way of just good lawyers
24 working things out. What the defense might call
25 class merits, we might agree is about class

1 certification. It's just totally unclear, until
2 we're sitting in a meet and confer, what we're
3 talking about.

4 I think that we are -- we have a burden, as
5 plaintiffs, to show the Court that we meet elements
6 of Rule 23. And you know, under Dukes and other case
7 law, it's a significant burden that we will, with
8 full force, attempt to meet.

9 However, we're not required, under the
10 current case law at least, to prove the entire
11 liability case at class certification. There are
12 often overlaps in merits and commonality, and
13 whatnot. But it's not that we have to prove it then.

14 And because there is an expectation under
15 Rule 26(b)(1), that there will be some
16 proportionality to how people discover the case, we
17 think it's appropriate to defer certain discovery
18 that may never be needed, until after we see the
19 class certification order.

20 We hope that we get a class certified.
21 That's why we're here. But if we don't, then we
22 don't have to be in the position of both parties
23 putting witnesses through depositions and looking at
24 documents and spending an enormous amount of
25 resources to discover a part of case that just is not

1 ever going to be necessary. So we're really talking
2 about a pretty narrow part of the discovery of this
3 case being postponed until after certification. But
4 we think that's appropriate to do that. And it may
5 fall under that label of merits in the minds of some.
6 I just can't tell until we get there.

7 THE COURT: All right. Your thoughts, Ms.
8 Speights?

9 MS. SPEIGHTS: Yes, Your Honor.

10 I mean, it's our view that at least the
11 discovery that occurs prior to the class
12 certification motions being filed would include all
13 class-related issues. That's the merits of
14 plaintiffs' class claim. And that's the only thing
15 that would be done -- the only discovery that would
16 be done after the decision on class certification
17 would be discovery that would relate to the
18 individual plaintiffs' claims, as well as any alleged
19 damages.

20 We are, you know, putting in a lot of time
21 for discovery on class issues. The plaintiffs have
22 proposed an extensive amount of depositions and
23 interrogatories, and all those things, which we will
24 talk about. Because we think it's a bit too much,
25 and just think that a second round of discovery after

1 class certification, if the class is certified, on
2 class-related issues will unnecessarily increase our
3 costs, and it will also delay the ultimate resolution
4 of the matter.

5 We're not saying there shouldn't be any
6 discovery after the decision. We think it should be
7 limited to the plaintiffs' individuals claims and
8 damages.

9 THE COURT: Well, let me speak a moment,
10 and then if this is not clear enough or helpful
11 enough, then perhaps you can tell me what ruling you
12 need. I have found that over the years, trying to
13 bifurcate class action discovery from merits
14 discovery is just not as fruitful as people thought
15 it was 30 years ago when I was doing class actions.
16 So, as a lawyer in the old days, what y'all are
17 saying was actually switched. The defendants wanted
18 to limit discovery to class certification issues, and
19 defendants wanted to -- or plaintiffs wanted to have
20 a full-blown, because they knew that, basically, the
21 ballgame was class certification.

22 If y'all had agreed to bifurcate the
23 discovery, then I would go along with it, because I
24 respect good counsel's sort of assessment. But, at
25 the same time, I'm not very optimistic that we can

1 meaningfully bifurcate it, because the class
2 certification in the modern era looks a whole lot
3 like a very merits-based scrutiny of the plaintiffs'
4 claims.

5 So since y'all were unable to agree on a
6 strict bifurcation, I'm not inclined to impose one
7 myself. Therefore, I think it's fairly wide open
8 discovery. So what I would anticipate is the
9 plaintiffs, you know, better do their discovery. If
10 they've got some witnesses that they just know they
11 don't need for class certification, I don't think I
12 should be forcing them to do that before the class
13 certification hearing.

14 On the other hand, if they've got a
15 witness, and it's half -- I'm not talking about
16 damages; it looks like everybody agreed, maybe, to
17 put damages aside -- but if you've got a witness
18 there that, you know, half the day would be spent on
19 whatever they would comfortably say is class
20 certification issues, then you've got another half
21 day that is probably merits issues, I think you
22 better just get it done. Because that's not the kind
23 of discovery that I would be enthusiastic about just
24 delaying and forcing us to re-track the witness down,
25 and start the process over.

1 So with that guidance, is that enough
2 guidance on this issue, or do you need a more
3 definitive ruling? What's your thoughts, Ms.
4 Dermody?

5 MS. DERMODY: Yes, Your Honor. No, it's
6 very helpful.

7 Again, I think I agree with Your Honor
8 completely. And these labels are sometimes
9 confusing. I had not intended for plaintiff to be
10 proposing to bifurcate class on merits. It really
11 was about having a phase of the case that's
12 discovered, that's focused on the class motion
13 efficiently, and a phase of the case that is cleanup,
14 to make sure we're all prepared for trial, where
15 there might be some additional fact witness
16 discovery.

17 And I think your guidance is spot on, Your
18 Honor. And we will take it to heart and prosecute
19 the case that way.

20 THE COURT: What do you think,
21 Ms. Speights? Is my guidance enough for today? Or
22 do you think you need something more definitive than
23 what I'm giving you as far as guidance?

24 MS. SPEIGHTS: Your Honor, your guidance
25 today is sufficient for our side.

1 THE COURT: All right. I'm looking through
2 the initial scheduling conference. It looks like
3 I've covered everything.

4 I'm obviously going to talk to you here in
5 a moment about how I do things. But is there
6 anything else from a deadline standpoint, your
7 issues, what you need from the initial scheduling
8 conference, what you need to see in the scheduling
9 order, that we haven't discussed, or I need to
10 address, Ms. Dermody?

11 MS. DERMODY: Your Honor, I'm not sure if
12 we can move much beyond this day without some
13 guidance on the discovery cutoff period. I'm sure
14 the parties will immediately get into a disagreement
15 about that, if we don't hear from Your Honor.

16 The plaintiffs have proposed having a
17 discovery cutoff that assumes that we will go back to
18 January 1, 2010, on data and policies, and January 1,
19 2012, for all other matters.

20 I think the defendants would like to
21 have -- I'll let them speak for themselves what they
22 would like to have, but I think they would like to
23 have a shorter discovery period. And we just need to
24 know collectively how to proceed, so that there
25 aren't silly disagreements between us about something

1 that Your Honor can tell us right now what you think
2 is right.

3 THE COURT: This is the discussion you're
4 having on pages 15 to 16; correct?

5 MS. DERMODY: Yes, Your Honor.

6 THE COURT: My memory -- and correct me if
7 I'm wrong -- the class period that you're looking
8 at -- was it 2008, that you went back to plaintiffs
9 that were hired in 2008? Am I correct?

10 MS. DERMODY: That is what we set forth in
11 the complaint, yes, Your Honor.

12 THE COURT: Right. So what you're
13 proposing is that -- it says here, "The parties agree
14 that if the Court grants the defendant's motion to
15 dismiss, the class period should begin on January 1,
16 2012." That's because, then, we're dealing strictly
17 with Title VII claims; correct?

18 MS. DERMODY: That's right, Your Honor,
19 yes.

20 THE COURT: Okay. Let me just make sure I
21 understand the positions. So if the plaintiffs say
22 the claims -- let's see, you are seeking two to three
23 years before the class liability date.

24 The defendant maintains the scope of
25 discovery should be limited to January 1, 2012. So

1 if we're dealing with a class period that begins on
2 January 1, 2012, tell me, Ms. Dermody, why you think
3 you need to go back before that period of time.

4 MS. DERMODY: Yes, Your Honor, sure.

5 We set forth a couple of cases that sort of
6 talk about this. But in an employment class action
7 dealing with company policies, it's often
8 illuminating to look at the trend line of what's been
9 happening with those policies, and not just take a
10 snapshot of the class period. Because the policies
11 obviously operated for periods that proceeded the
12 class liability period. And it has been at least our
13 experience that it's sort of standard operating
14 procedure to take a look-back two or three, and
15 sometimes four or more years prior to that period.

16 I do think that the plaintiffs have an
17 obligation to respect proportionality, and that for
18 purposes of all kinds of ESI-type materials, that
19 that's too much to ask for. But for data, which is
20 really just mapping from the payroll systems,
21 whatever the time period is for, you know, writing a
22 program, it doesn't take any more time or any more
23 man-hours to get that material if you do it one year
24 versus another.

25 So for purposes of data, we think that

1 there is not really a burden. We think that because
2 it's extremely probative, and it's a discrete amount
3 of material, getting policy information going back is
4 very important.

5 But for other things, as I said upfront, I
6 think there are reasonable limits to draw. And we'd
7 be happy to have those limits drawn here.

8 THE COURT: All right. What's your
9 thoughts, Ms. Speights?

10 MS. SPEIGHTS: Your Honor, I just want to
11 correct a few things, because I think --

12 THE COURT: All right.

13 MS. SPEIGHTS: -- Ms. Dermody may have
14 misspoken.

15 The liability period here is back to
16 February of 2014, is the start of the liability
17 period under Title VII; not January of 2012.

18 What we agreed to was that in terms -- the
19 liability period starts February of '14, February
20 2014. We would be agreeable to going back two years
21 for discovery. So if you look at page 15, under
22 discovery cutoff, it says that, "The parties agree
23 that if the Court grants defendant's motion to
24 dismiss plaintiffs' state law claims, the class
25 discovery" -- not liability -- "the class discovery

1 period should begin on January 1, 2012," which is two
2 years before the Title VII liability period. And we
3 don't think that we should be going back. I mean,
4 we're already agreeing to two years before the
5 liability period. And that's sufficient for either,
6 whether it's data or whether it's documents. It
7 doesn't make any sense to us that there would be a
8 different discovery period for data versus policies
9 and other type things, Your Honor.

10 MS. DERMODY: Your Honor --

11 THE COURT: Let me ask Ms. Speights this:
12 What we're basically disputing over is whether it
13 should be four years back or two years back. So
14 that's the dispute; correct, Ms. Speights?

15 MS. SPEIGHTS: That's correct, Your Honor.

16 And that would be off of the liability
17 period as of February of 2014, under Title VII.

18 THE COURT: And you're saying that there
19 shouldn't be one sort of discovery deadline for
20 payroll information, employment information, and then
21 policies. It should just be one deadline for
22 everything; correct?

23 MS. SPEIGHTS: Correct, Your Honor.

24 THE COURT: All right. Ms. Dermody, you
25 were going to say something?

1 MS. DERMODY: Yes, Your Honor. Yes,
2 Ms. Speights corrected my answer. I appreciate her
3 doing that. I misunderstood your question.

4 I think that the issue here has been at
5 least that to the extent there is some chance that
6 state law claims will be resurrected here, the
7 parties collectively don't want to be in a position
8 of having to stop-start on discovery that's ongoing.
9 I know that it's burdensome on the defendants to pull
10 data multiple times, using different time periods.
11 And so one of the ways to alleviate that problem is
12 to pull data once for just a broader time period than
13 they would pull it. As I said, I don't think that's
14 any additional burden at all. It's just about making
15 sure you do it once and it's efficient.

16 It also doesn't seem to be inappropriate to
17 pull the documents concerning the key policies in
18 this case that are really what the case will turn on
19 for a period of time that goes back more than two
20 years. That isn't atypical. And I certainly have
21 seen courts in lots of areas split the baby between
22 discovery that is quite burdensome and costly, having
23 a smaller time period than discovery that is more
24 discrete and more highly probative.

25 So we would propose that this is an

1 appropriate approach here. It saves us problems
2 downstream, if we are fortunate enough to convince
3 Your Honor that the state claims are preserved. And
4 it's consistent, even at four years with the case law
5 we presented to Your Honor.

6 MS. SPEIGHTS: Your Honor -- I'm sorry.

7 THE COURT: Let me ask Ms. Dermody one
8 question here: You're not suggesting a different
9 deadline or cutoff for policies, procedures, and then
10 what I'll kind of call the hard employment data, are
11 you? You're just simply saying: Make a deadline
12 across the board, and perhaps some of the material
13 you can agree to forego because it may not be
14 proportional to the needs that you have in the case?
15 Am I reading your position correctly?

16 MS. DERMODY: Close, Your Honor. I think
17 actually we're asking for something that's a little
18 firmer on plaintiffs, which is that we only are
19 entitled to get data and policy documents back to
20 2010. And the presumptive discovery cutoff for all
21 other types of documents, which is the majority of
22 documents, would start January 1, 2012, which is
23 agreed between the parties.

24 THE COURT: All right. You were going to
25 say something further, Ms. Speights?

1 MS. SPEIGHTS: Yes, Your Honor. With
2 respect to the state law claims, if for some reason
3 they came back in -- I mean, we have to remember that
4 the state statute was not enacted until June 14th of
5 2013. So to say that somehow if those claims come
6 back in, that would justify going back further or
7 doing it all at one time now, we would disagree with
8 it, Your Honor. Even given that it was not enacted
9 until 2013, I mean, you know, we would argue that
10 there is no liability before then. So if that is the
11 liability period, going back to January 2012, when
12 the statute wasn't even in effect, we believe is a
13 reasonable compromise, whether or not the state law
14 claims are in or out.

15 THE COURT: Give me a moment to rereview
16 the materials on 12, 13, and refresh my memory as to
17 what y'all said.

18 Well, probably if I had been left to my own
19 devices, and this dispute had just been presented to
20 me without reference to the motion to dismiss, I
21 would have probably gone -- it seems to me four years
22 is a little long, and it seems two years is a little
23 short. But it seems to me that y'all kind of agreed
24 on this issue; the parties agree that if the Court
25 grants the defendant's motion to dismiss, the class

1 discovery period should begin on January 1, 2012.
2 The dispute was only if I denied the motion. And the
3 defendants didn't -- don't seem to me to have really
4 deviated from their position. Their position was
5 always all along that it should be limited to January
6 1st.

7 The plaintiffs wanted to go back to 2010,
8 if I'd upheld the state law claims, indicating that
9 two to three years before the opening class liability
10 period is something that was a, quote, "modest
11 request." They're getting two years. I think we're
12 kind of quibbling over whether it should be backed up
13 three. But it doesn't seem like even the plaintiffs
14 were advancing, really, a four-year period before I
15 made the decision on the motion to dismiss.

16 I think that probably what the defendants
17 propose here is reasonable, modest. I think it's in
18 line more with proportionality. I'll use the cutoff
19 date of January of 2012. But I'll indicate to you
20 that if the plaintiff gets into the case, and gets
21 some documents or something that indicates they need
22 to go back further, then the courthouse door is not
23 closed. So, Ms. Dermody, if you want to come back
24 and say, Here, Judge, here are some documents that
25 suggest a reason we need to go back further, then

1 I'll remember this conversation, and I'll probably be
2 receptive to allowing some selective discovery
3 backwards.

4 But I think, given where we are, it sounds
5 like the defendants are willing to run the risk that
6 if the state claims are readded back in for some
7 reason, they may have to look at a different
8 deadline. They're willing to restart and redo their
9 discovery, as long as they're making an informed
10 decision that that might be something that happens.
11 Then I think that probably the deadline they are
12 proposing is the one that we should go with.

13 All right. Is there anything else from a
14 scheduling standpoint that we need to discuss? Any
15 other deadlines before I tell you how I do a few
16 things, Ms. Dermody?

17 MS. DERMODY: No, I don't think so, Your
18 Honor. And thank you for the feedback on the
19 discovery cutoff. I think you've saved the parties a
20 lot of hours of back and forth getting that sorted
21 out.

22 THE COURT: Ms. Speights, how about you?

23 MS. SPEIGHTS: No, Your Honor.

24 THE COURT: All right. Let me give you a
25 few things about how I do things.

1 On discovery, I give you a choice. I find
2 that most civil lawyers just need an answer. So if
3 you would like to take advantage of that, just call
4 my courtroom deputy; I'll get on the phone with you,
5 and try to resolve it. Most of the time I can
6 resolve it on the phone. Occasionally, I have to
7 look at something like an RFP or an interrogatory and
8 make an informed decision, so it may take two or
9 three days to get back with you. But usually I can
10 give you fairly quick answers. Even when I'm in
11 trial, I take breaks, and I can get on the phone with
12 you and try to work out discovery disputes with you.

13 If you would prefer to formally brief a
14 discovery dispute, that's fine. Some discovery
15 disputes lend themselves to briefing. And we'll talk
16 about motions in a moment. And if would you prefer
17 that Judge Fashing -- no, this is Judge Fouratt. If
18 you'd prefer that Judge Fouratt do the discovery
19 disputes in this case, that's fine as well. Just let
20 my courtroom deputy know. Because if I don't hear
21 from you, I'm on default; I do my own discovery
22 unless I hear otherwise from you.

23 On motions, you have an obligation to meet
24 and confer in federal court. That's required by the
25 Federal Rules of Civil Procedure, as well as the

1 local rules.

2 What I'm about to tell you is not required,
3 though it is in some districts, but I don't require
4 it myself. But if you would like to take advantage
5 of that, call my courtroom deputy, and I'll get on
6 the phone with you or meet you here in the courtroom,
7 or meet you in chambers, whatever works out. I find
8 that if I sit in on the meet and confers, most of the
9 issues fall by the wayside and we really begin to
10 focus on what the Court needs to decide and what the
11 parties need from the Court. So, again, if you'd
12 like to take advantage of that, just call my
13 courtroom deputy. I don't require that. Federal
14 court requires enough stuff. But as y'all know, many
15 districts are beginning to require this. And they're
16 reporting, you know, that they are resolving about 98
17 percent of the disputes this way. So if you'd like
18 to take advantage of that, let us know.

19 We've set some deadlines today. We'll get
20 a scheduling order that sets these further. You
21 obviously can file motions in advance of these. If
22 you do, it does help if you'll call my courtroom
23 deputy and tell her that you have filed this motion.
24 She's very good at looking at the docket and finding
25 them as well. But it does help, and she'll set the

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1 hearing, and I will try to be ready to either rule at
2 the hearing, or at least give you an inclination, so
3 I can keep the case moving for you, and keep it
4 moving on my docket as well.

5 I don't know your case well enough -- we've
6 talked some about experts -- I don't know your case
7 well enough to know whether you're going to have
8 Daubert issues. If you get into the case and you
9 think there is going to be Daubert issues, if you can
10 agree on a deadline, do so, and put it in a motion
11 and order. If you get in the case and you think
12 there is going to be Daubert issues, but you can't
13 agree on a deadline, call my courtroom deputy, and
14 I'll get on the phone and work with you to set a
15 deadline.

16 Now, in a class certification, you can
17 probably look at enough of my opinions -- and I
18 encourage you to look at the footnotes, because
19 that's where I usually resolve issues related to
20 class certification -- you can see how I do it. If
21 you want to do it that way, that's fine. We just
22 basically show up at the class certification
23 hearings, people make their arguments. And as part
24 of my task of determining what's admissible evidence,
25 I resolve in the footnote what I'm going to consider

1 and what I'm not going to consider. But you might
2 want to stare at that. Because other class
3 certifications you can see that the parties wanted me
4 to treat the class certification much more like a
5 trial, and they wanted to have a day or some days in
6 which they challenged each other's experts. So I
7 made pretrial rulings, preclass certification rulings
8 on the Daubert issues. I issued opinions, then
9 everybody knew what was going to be heard and not
10 heard.

11 Experts are expensive. Class certification
12 hearings can be expensive. So I'll probably go along
13 with whatever y'all agree on. If you can't agree,
14 get my courtroom deputy and me on the phone and I'll
15 resolve it and try to help you. But do keep that in
16 mind. Because my experience is that experts are
17 playing a more and more prominent role in these class
18 certification hearings each time I tackle a new one.

19 Given the location here, I'm assuming
20 everything is in Albuquerque.

21 Let me ask my courtroom deputy, anything
22 else that we need to discuss that you can think of?
23 Anything I've overlooked?

24 THE CLERK: I just want to make sure that
25 we understand what the deadline is, and if there is a

1 deadline for the defendants to amend the pleadings
2 and join parties. I think it's on page 2 of the JSR
3 and the PDP.

4 THE COURT: Did I not give that March 5th
5 date?

6 THE CLERK: Well, that was where I think
7 you began to talk about experts, you know, and
8 indicating that they needed to be ready to be deposed
9 at the time they were identified, and their reports
10 provided. So I think that's what you said there
11 instead of providing that date, I think. I could be
12 wrong.

13 THE COURT: All right. The plaintiffs
14 shall be allowed until 90 days before the filing of
15 their motion for class certification, or February 19,
16 2018, to move to amend the pleadings and/or join
17 additional parties in compliance with the
18 requirements of Rule 15(a). And I think I said at
19 that point that what means is that's when you've got
20 to identify your expert, produce your expert report,
21 and have them ready to be deposed. You don't have to
22 have them deposed, but have them ready to go, because
23 the defendants are allowed 14 days from the filing of
24 the amendment or joinder of the parties, or until
25 March 5, 2018, to move to amend the pleadings and/or

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1 to join additional parties, in compliance with the
2 requirements in Rule 15(a). Again, it doesn't change
3 the substantive requirements of Rule 15(a). In other
4 words, if you can do something as of right, you need
5 to do it by that date. And if you need to move for
6 leave of the Court, you need to move by that date.
7 So this sets two deadlines for when you have to do
8 what you have to do under Rule 15(a), but it doesn't
9 change the substantive requirements.

10 Anything else, Ms. Wild?

11 THE CLERK: No, sir.

12 THE COURT: All right. Let me ask both
13 counsel if there is anything else we need to discuss
14 while we're together, if there is anything else we
15 need to do today? Ms. Dermody?

16 MS. DERMODY: I don't believe so, Your
17 Honor. Thank you very much.

18 THE COURT: All right. Mr. Gordon,
19 Ms. Speights.

20 MS. SPEIGHTS: Your Honor, there was one
21 other issue under the joint status report. One of
22 the exceptions related -- well, I guess it wasn't an
23 exception, but there is a discussion about the
24 proposed limitations on written discovery and
25 depositions. And we had a difference of opinion

1 there. That's at page 10 and 11, Your Honor.

2 THE COURT: Well, what I typically do is
3 not impose -- if the parties can agree, because of
4 cost concerns or something, then I go along with some
5 special limitations on written discovery and
6 depositions.

7 Here, where we've got one side wanting
8 some, and others not, and you've already seen, I
9 tipped my hand as to the fact I'm not really inclined
10 to try to strictly police this in the early stages
11 between class certification and merits discovery. I
12 guess I'm not inclined to impose any sort of special
13 limitations on discovery or depositions.

14 Y'all will have to correct me if I'm wrong,
15 but I think, and again, correct me if I'm wrong, but
16 the maximum number of interrogatories is already
17 limited by the local rules to 25, if my memory is
18 correct. The Civil Rules of Procedure don't impose
19 any sort of limitations on RFPs. And I've never
20 quite understood how that could really be policed
21 anyway, because whatever documents you're going to
22 need to produce, you're going to have to produce
23 whatever documents, whether you state it in ten RFPs
24 or you state it in 50 RFPs.

25 I don't remember if there is any limitation

1 on RFAs. There may or may not. I've always thought
2 that the way the Tenth Circuit construes amendments
3 of RFAs, they are extremely limited. They might give
4 you some help in getting concessions on the
5 genuineness of documents. And in that situation, it
6 doesn't seem that it's in anybody's interests to
7 limit it.

8 So unless my memory of the Rules of Civil
9 Procedure are wrong, I would be inclined to use the
10 maximum for interrogatories, and not impose any for
11 RFPs and RFAs.

12 I think the rules limit it to ten per side
13 on the depositions. I'd be inclined to start with
14 that. I would not be inclined to limit it to four
15 hours. I think that the rules provide for seven
16 hours. So, basically, just using the federal rules
17 as the default, rather than inventing anything at
18 this stage. I'll remember this conversation; that
19 the defendants wanted to limit, and the plaintiffs
20 are talking about a lot more discovery than this.

21 If y'all can't work it out at the time
22 you're actually doing it, then I'll wade in, and I'll
23 remember the conversations. I'm fairly liberal on
24 discovery, even at the class certification. It does
25 strike me that 25 depositions would be a lot of

1 depositions for a class certification, or even
2 perhaps a merits case of this magnitude. I won't
3 prejudge that at this point. But that would strike
4 me as being on the high side.

5 On the other hand, it seems to me that ten
6 may be a little low. So maybe I ought to go with the
7 defendants a maximum of 15, which is a little higher
8 than I would normally impose. That gives the
9 plaintiff a little bit more leeway.

10 And if you're getting beyond that, and you
11 can't work it out, then maybe you need to come back
12 to me, and I'll see what further depositions need to
13 be set beyond 15 a side.

14 Ms. Speights, is my memory wrong, or do you
15 have anything else you want to say on your proposed
16 limitations? That's kind of how I'd resolve those.

17 MS. SPEIGHTS: No, Your Honor. That's
18 fine. And your memory is correct.

19 THE COURT: Can you live with that, Ms.
20 Dermody?

21 MS. DERMODY: Your Honor, thank you for the
22 guidance. I will only just observe that within this
23 very statement the defendants have already listed 18
24 people on their side who have knowledge. That's
25 before plaintiffs have even gotten into the case and

1 seen documents, and ourselves identified who we
2 believe the right decision-makers are.

3 So we weren't trying to be extravagant with
4 the proposal for 25. We just are looking at what
5 already is sitting here, and realizing that there
6 might be quite few people who we have to depose, and
7 it's not quite the typical case in that sense.

8 MS. SPEIGHTS: Your Honor --

9 THE COURT: Yes, Ms. Speights.

10 MS. SPEIGHTS: I'll respond to that.

11 I mean, we will work with Ms. Dermody on
12 these issues. Most of those people who are listed
13 are managers that would go to the individual claims,
14 not to the class claim; most of those 18. But we can
15 talk with her about that.

16 THE COURT: Let's shoot for 15 right now.
17 Let's stick with that deadline. I think that's
18 pretty general in my experience to begin a case. You
19 know, if it turns out it's 18, and the plaintiff
20 makes a good case for three more depositions,
21 probably I'm going to grant it. So listen to them
22 real carefully, Ms. Speights, because I may -- if
23 they make a case for three more depositions, I may be
24 inclined to give them, particularly if they're people
25 that have information.

1 All right. Ms. Speights, anything further
2 we need to discuss while we're together? Anything
3 else I can do for you today?

4 MS. SPEIGHTS: Nothing from me. But I'd
5 like to ask Mr. Gordon, to make sure he doesn't have
6 anything else.

7 MR. GORDON: Nothing further from our end
8 either, Judge. Thank you.

9 THE COURT: All right. Well, again, let me
10 thank you for the courtesy of letting me do this from
11 Dallas. It gave me an opportunity to spend a little
12 bit more time. And Ms. Wild has already told me this
13 may be my summer vacation. So I appreciate y'all
14 letting me do this from the Dallas area.

15 We set -- you know, on these civil cases,
16 if y'all agree to move stuff, as long as you're in
17 agreement, I've got a lot more flexibility than I do
18 in my criminal cases. So if y'all get into the case
19 and you need to move stuff, and y'all agree, put it
20 in a motion and order, and I almost always can go
21 along. If you can't agree, don't spend a lot of time
22 briefing it up. Just call my courtroom deputy, and
23 get me on the phone, and I'll try to work it out with
24 you. So let us know how we can help you litigate
25 this case as expeditiously and inexpensively as

1 possible.

2 All right. Y'all have a good afternoon.

3 And, again, thank you for your courtesy.

4 (The telephonic hearing was concluded at
5 2:48 p.m.)

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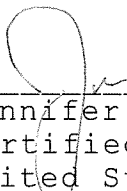
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UNITED STATES OF AMERICA

DISTRICT OF NEW MEXICO

I, Jennifer Bean, FAPR, RDR, CRR, RMR, CCR,
Official Court Reporter for the State of New Mexico,
do hereby certify that the foregoing pages constitute
a true transcript of proceedings had before the said
Court, held in the District of New Mexico, in the
matter therein stated.

In testimony whereof, I have hereunto set my
hand on August 2, 2017.



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